Supreme Court of the United States

OCTOBER TERM 1940

NO. 781

CLOVERLEAF BUTTER COMPANY, A CORPORATION,

Petitioner,

vs.

HAYGOOD PATERSON, as Commissioner of Agriculture & Industries of the State of Alabama, et. al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

I.

OPINION OF THE COURT BELOW.

The opinion of the United States Circuit Court of Appeals for the Fifth Circuit, which petitioner is asking this Court to review, is reported in 116 F. (2d) 227.

II.

JURISDICTION.

Petitioner seeks to invoke the jurisdiction of this Court to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit rendered on the fourteenth day of January 1941. Petitioner relies upon Section 240 of the Judicial Code as amended by Acts of February 13, 1925, Subsections (a) and (b), seperately and severally (U.S.C.A., Title 28, Sec. 347), and also Rule 38 of the Revised Rules of the Supreme Court of the United States, adopted February 13, 1939.

Petitioner bases his claim for relief on the following proposition:

> That Congress, by the enactment of the so-called Renovated Butter Act of May 9, 1902 as amended, U.S.C.A., Internal Revenue Code, Chapter 16, Sections 2320 to 2327, has preempted and completely occupied the field of inspection of country or packing stock butter moving in interstate commerce into Alabama and into petitioner's plant for renovating or processing there into process butter or renovated butter for sale and shipment in interstate commerce, to the exclusion of state regulation.

III.

STATEMENT OF CASE.

The Department of Agriculture and Industries of the State of Alabama acting through its Division of Agricultural Chemistry during the period from April, 1939 to June, 1940; seized certain country or packing stock butter belonging to petitioner.* The seizures were made in every instance under authority of Section 217, Agricultural Code of Alabama of 1927 as amended by General Acts, 1935, Sec. 3, pp. 1103 and 1104, and Section 218 of said Agricultural Code of 1927. (See Affidavit for Writ of Attachment for Condemnation, copy of which appears in Appendix, p. 51. The seizures were made in each instance on the theory that such country or packing stock butter was an adulterated food within the meaning of Sections 37, 38, and 39 of the Agricultural Code of Alabama of 1927 (Appendix pages 42, 43) in that it consisted "in whole or in part of a filthy, decomposed or putrid or animal substance or any portion of an animal unfit for food, whether manufactured or not***".

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*Counsel's intimation that these seizures reversed "the custom and practice of twenty years" (Brief p. 22) is without foundation in the record or elsewhere. Apposite to the implication, and in refutation of it, is the following from this Court's opinion in Kelly vs. Washington, 302 U. S. 1, at p. 14:

> "Much is made of the fact that the state law remained unenforced for a long period. But it did not become inoperative for that reason. Where the state police power exists, it is not lost by non-exercise but remains to be exerted as local exigencies may demand."

On June 28, 1940, there was filed in the United States District Court, Southern Division of the Middle District of Alabama, a complaint seeking a temporary and permanent injunction against the Commissioner of Agriculture and Industries of the State of Alabama and the Director of the Division of Agricultural Chemistry in the Department of Agriculture and Industries of the State of Alabama, to restrain them from enforcing the above noted laws. (R. 2). On the same day, June 28, 1940, the Honorable C. B. Kennamer, Judge of said District Court, entered an order setting the application for preliminary injunction for hearing on the twelfth day of July, 1940, (R. 26).

On July 12, 1940, respondents filed a motion to dismiss the complaint, (R. 45). This motion to dismiss was at first overruled by the District Court, (R. 47). Thereupon the respondents filed an answer and the petitioner moved to strike from the answer filed, certain language set out in the said motion. The Court overruled the motion to strike (See reference in third paragraph of the decree, R. 47), and set Thursday, July 25, 1940 as the time and place for further hearing.

Prior to the date fixed for the further hearing, counsel for the parties agreed to limit the issues to be submitted to the Court by stipulation, in lieu of taking testimony, and to resubmit the cause to the Court on the complaint and the stipulation limiting the issues and the motion to dismiss. Pursuant thereto, the parties entered into such stipulation

(R. 48, 49) and, on the same date, (July 23, 1940) resubmitted the cause to the Court on the complaint and stipulation and the motion to dismiss. On this submission, the Court entered the decree dismissing the bill, (R. 50). Petition for appeal to the United States Circuit Court of Appeals for the Fifth Circuit was duly filed (R. 53) and argued on July 23, 1940, (R. 53).

Upon consideration of the matters and things presented on the appeal, the United States Circuit Court of Appeals for the Fifth Circuit affirmed the judgment of the District Court of the United States for the Middle District of Alabama (R. 69), Circuit Judge Hutcheson issuing the opinion (R. 59) with Foster, J. dissenting.

Petitioner's application for rehearing, filed on January 4, 1941, was duly denied by the Circuit Court of Appeals on January 14, 1941, whereupon petitioner applied to this Honorable Court for writ of certiorari.

ARGUMENT.

I

THE DECISION OF THE COURT OF APPEALS IN THIS CAUSE IS IN ACCORD WITH THE APPLICABLE DECISIONS OF THIS COURT.

A.

The Protection and Promotion of the Health of its Citizens is an Inherent Power of the State of Alabama, and so long as the exercise of this power does not conflict with the Constitution or Statutes of the Central Government, the State of Alabama may act without limitation, even though its action may directly affect Interstate Commerce.

The general principles covering the exercise of State authority when interstate commerce is affected, have been repeatedly stated by this Court. Many cases are collated in the opinions in the *Minnesota Rate Cases*, 230 U. S. 352, 398-412, and *South Carolina Highway Department vs. Barnwell Bros.*, 303 U. S. 177, 184, 188-191.[1]

From the authorities collated in these decisions it is apparent that State statutes designed to safe-

[1] While other cases might be cited, we deem it inadvisable to unnecessarily burden this brief with them, since these two cases deal at length with most of the pertinent decisions.

"all articles of food, drink, confectionery, or condiment, whether simple, mixed, or compound, used or intended for use by man or domestic animals."[4]

In Section 39 it is stated that an article shall be deemed adulterated in the case of food,

"if it consists in whole or in part of a filthy, decomposed or putrid animal or vegetable substance or any portion of an animal unfit for food, whether manufactured or not***".

These regulations, it is submitted, were imposed by the Legislature of Alabama in accordance with its constitutional right to determine the policy which it believed would protect the health of the people of the State of Alabama and safeguard them from fraud and imposition.[5]

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[4] NOTE that in U. S. vs. Nine Barrels of Butter 241 Fed. 499, 500, District Judge Learned Hand writing to the question of whether packing stock butter should be considered as "food" stated:

"Doubts may arise, where goods are shipped in interstate commerce, which may or may not be articles of food, as their ultimate destination may determine; but this case does not raise them. By no chance can this butter be called anything but an article of food; by no chance can I avoid the conclusion that it was filthy and decomposed in part. As such it came within the terms of the statute, even though it might be saved and reclaimed by being made clean and palatable".

[5] Cf. Pacific States Co. vs. White 296 U. S. 176, 181, 182. Also, compare logic of Mr. Justice Black in the dissent in Polk Co. vs. Glover, 305 U. S. 5, 11, 15.

It can be concluded, therefore, that these regulations, being enacted under the police power of the State, may be effective upon the subjects sought to be regulated even though they may incidentally affect interstate commerce.

This conclusion is based, of course, upon the assumption of an absence of Federal legislation covering the field. Whether the Renovated Butter Act of 1902 preempts state action is therefore to be considered.

B

Congress has not occupied the field by the Renovated Butter Act, nor has it, by such Act, regulated Interstate Commerce to the exclusion of State action.

1.

The Renovated Butter Act is not intended as a regulation of commerce. It is a revenue measure. Its field of activity has long since been delineated by this Court.

It is earnestly contended by petitioner that Congress has preempted the field of inspection of country or packing stock butter in interstate commerce going into the manufacture of process butter for sale and shipment in interstate commerce. Counsel for petitioner, on p. 16 of their brief in support of petition for writ of certiorari, state:

"The question of whether or not Congress has preempted and completely occupied the field

of inspection or regulation of the raw materials in interstate commerce, going into the manufacture of process butter for sale and shipment in interstate commerce, necessarily calls for a construction of the Acts of Congress known as the Renovated Butter Act. It may be appropriately asked, 'What has Congress done about this matter?' "

Counsel then proceed to conclude that the Renovated Butter Act, and the regulations promulgated pursuant thereto, indicate that Congress has completely occupied the field of inspection or regulation in this regard. Counsel, as their major premise, announce:

"The main purpose of the Renovated Butter Act was:

> 'To provide for the sanitary inspection of such butter at the place of manufacture, and to take every precaution in order that none shall be shipped from the factory which can in any way be injurious to the health of the consumers'.

United States vs. Bohl, 125 Fed. 625."[6] (Brief p .10)

We earnestly submit, however, that the argument of counsel is specious, in that it erroneously assumes the basic purpose of the Renovated Butter Act and the regulations promulgated pursuant thereto.

It is to be remembered that the Renovated Butter Act of 1902, 32 Stat. 193, was but an amendment and an extension of the Oleomargarine Act of 1886, 24 Stat. 209. This Court, in considering the Act of 1886 in *In Re Kollock*, 165 U. S. 526, 537 observed:

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[6] Although the quotation from United States vs. Bohl 125 Fed. 625, appearing on p. 10 of counsel's brief, appears to be a full sentence—as quoted by counsel—the reported decision shows that the full sentence is as follows:

> "It is equally clear that the purposes of the **section** are to provide for the sanitary inspection of such butter at the place of manufacture, and to take every precaution in order that none shall be shipped from the factory which can in any way be injurious to the health of the consumers".

This conclusion of the District Judge is limited to a particular section of the Act, not the entire Statute, and must be considered in the light of the statements of this Court that the motive or purpose of Congress in adopting the Renovated Butter Act may not be inquired into, but in considering the Act, the Act as a whole must be dealt with and its scope and effect considered. McCray vs. U. S. 195 U. S. 27, 59. This Court looking at the Act in its entirety, has held that the regulations were in execution of or supplementary to, but not in conflict with the law itself, being specifically authorized thereby in effectuation of legislation imposing the tax. In Re Kollock 165 U. S. 526, 533; Plumley vs. Massachusetts 155 U. S. 461.

"The oleomargarine legislation does not differ in character from this, and the object is the same in both, namely, to secure revenue by internal taxation and to prevent fraud in the collection of such revenue. *Protection to purchasers in respect of getting the real and not a spurious article cannot be held to be the primary object in either instance,* and the identification of dealer, substance, quantity, etc., by marking and branding *must be regarded as means to effectuate the objects of the act in respect of revenue.*" (Emphasis supplied)

At the October Term, 1903, there was presented to this Court, in *McCray vs. United States*, 195 U. S. 27, the validity of the 1902 Act. Mr. Justice White, in speaking for the Court, in his summary of the provisions of the 1902 Act, notes:

"The section in question (Sec. 1) as well as those following it, contain many administrative provisions for the enforcement of the taxes levied by the Act and concerning interstate and foreign commerce in the articles referred to".

The Court, in reaching the conclusion that the Act was constitutional and that it was not an unwarranted encroachment upon, and an interference with the police powers reserved to the several states and to the people of the United States, concluded:

"*In determining whether a particular Act is within a granted power, its scope and effect*

are to be considered. Applying this rule to the acts assailed, it is self-evident that on their face, they levy an excise tax. That being their necessary scope and operation, it follows that the acts are within the grant of power." (195 U. S. 59) (Emphasis supplied)

It is to be noted that the Court declined to consider the contention urged upon it, that the motive of Congress was to regulate and not to tax, and rested the decision upon the conclusion reached by Mr. Chief Justice Fuller in *In Re Kollock* (165 U. S. 536) that

> "The Act before us is on its face, an act for levying taxes, and although it may operate in so doing to prevent deception in the sale of oleomargarine as and for butter, its primary object must be assumed to be the raising of revenue".

Thus it appears that the intention of Congress, in enacting this statute, must be derived from the language of the whole act. The mere fact that a provision for regulation is included in the statute is certainly no indication, in and of itself, that Congress intended to preempt the field of regulation, but must, we submit, be considered only as a provision by Congress for the enforcing of its taxing statutes.[7, 8]

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[7] Cf. Magnano Co. vs. Hamilton 292 U. S. 40, 47.

[8] In Kelly. v. Washington, 302 U. S. 1, at page 13, it is observed: "The fact that federal regulations were (are) numerous and elaborate does not extend them beyond the boundary they established."

This Court, as appears from the foregoing authorities, in determining the essential character of legislation, seems to view it, not objectively, i.e., merely by looking at the scope of its operation, but attempts to seek out the essential character of the legislation. As Chief Justice Marshall comments, in *Gibbons vs. Ogden*, 9 Wheat. 1, 204

> "All experience shows that the same measures, or measures scarcely distinguishable from each other, may flow from distinct powers; but this does not prove that the powers themselves are identical".

The same idea appears in the concurring opinion of Justice Johnson at p. 235. He there says,

> "It is no objection to the existence of distinct, substantive powers, that, in their application, they bear upon the same subject * * *. Their different purposes mark the distinction between the powers brought into action; and while frankly exercised, they can produce no serious collision".

It is submitted, therefore, that the legislation referred to as the Renovated Butter Act of 1902, is to be considered in the light of its primary purpose, i.e., the levy of taxes, and the incidental regulation of the field to which such taxes apply should not be considered by this Court as an indication on the part of Congress that it intends to preempt the State's regulatory rights under its police power.

Counsel's intimation that the State is excluded from the field because a tax is paid by petitioner is obviously unsound. It has been long since settled that the mere licensing or taxing of the products sold gives no right to keep or sell such property in violation of the State law.[9] In the *License Tax Cases* (5 Wall. 462, 473) it was held that a license by Congress upon the persons engaged in the business of sale of lottery tickets and retail dealers in liquors, did not operate to preclude state regulation of such trade. The statement of the Court, found at p. 473, is particularly apposite here:

> "There is nothing hostile or contradictory, therefore, in the Acts of Congress to the legislation of the states. What the latter prohibits, the former, if the business is found existing notwithstanding the prohibition, discourages by taxation. The two lines of legislation proceed in the same direction, and tend to the same result. It would be a judicial anomaly, as singular as indefensible, if we should hold a violation of the laws of the State to be a justification for the violation of the laws of the Union."

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[9] McGuire vs. The Commonwealth, 3 Wall. 382, 395; Pervear vs. The Commonwealth, 5 Wall. 475, 479.

We, therefore, earnestly submit that the Court of Appeals correctly held that the Renovated Butter Act could not be considered as preempting the field, since we think it was clearly the intention of Congress not to regulate commerce by such act, but merely to impose a tax upon articles which it found should bear a portion of the nation's tax burden.

The Court's decision finds further support in the following statement of this Court in *Plumley vs. Massachusetts*, 155 U. S. 461, 466:

> "Nor was the Act of Congress (the Oleomargarine Act of 1886 in 24 Stat. 209) relating to oleomargarine intended as a regulation of commerce among the States. Its provisions do not have special application to the transfer of oleomargarine from one State of the Union to another. They relieve the manufacturer or seller, if he conforms to the regulations prescribed by Congress or by the Commissioner of Internal Revenue under the authority conferred upon him in that regard, from penalty or punishment so far as the general government is concerned, but they do not interfere with the exercise by the States of any authority they possess of preventing deception or fraud in the sales of property within their respective limits."

Assuming that the Renovated Butter Act was intended as a regulation of commerce, Congress has specifically indicated its will that interstate commerce in renovated or process butter may be subjected to restrictions by the State.

Without waiving the position which we have taken above under the foregoing Proposition 1, we further submit that, assuming that the Renovated Butter Act was intended as a regulation of commerce, there is no ground to suppose that Congress intended in that enactment to interfere with the exercise by the States of any authority they could rightfully exercise over the manufacture or sale within their respective limits, of the articles defined as process or renovated butter.

The Renovated Butter Act, as above noted, imposes certain special taxes upon manufacturers of renovated or process butter, as well as upon wholesale or retail dealers in that product. It is expressly declared (Section 4, 32 Stat. 195)

> "And Sections * * * 3243[10] of the Revised Statutes of the United States are, so far as applicable, made to extend to and include and apply to the special taxes imposed by this section and to the persons upon whom they are imposed."

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[10] Section 3243 of the Revised Statutes, Title Internal Revenue, is carried forward in the exact language as Section 3276 of the United States Internal Revenue Code of 1939 (U. S. C. A., Title 26), and is still in full force and effect.

Section 3243 of the Revised Statutes of the United States is as follows:

> "The payment of any tax imposed by the internal revenue laws for carrying on any trade or business shall not be held to exempt any person from any penalty or punishment provided by the laws of any State for carrying on the same within such State, or in any manner to authorize the commencement or continuance of such trade or business contrary to the laws of such State or in places prohibited by municipal law; nor shall the payment of any such tax be held to prohibit any State from placing a duty or tax on the same trade or business, for State or other purposes."

This Court has heretofore had occasion to consider the purpose of Congress in incorporating into a statute the provisions of Section 3243 of the Revised Statutes.

In *Plumley vs. Massachusetts*, supra, p. 466, it is stated:

> "It is manifest that this section was incorporated into the act of August 2, 1886, to make it clear that Congress had no purpose to restrict the power of the States over the subject of the manufacture and sale of oleomargarine within their respective limits. The taxes prescribed by that act were imposed for national purposes, and their imposition did not give authority to those who paid them to engage in the manufacture or

sale of oleomargarine in any State which lawfully forbade such manufacture or sale, or to disregard any regulations which a State might lawfully prescribe in reference to that article."

Attention is particularly directed to the fact that the Plumley case was decided some six years before the enactment of the Renovated Butter Act of 1902. It must be assumed, under the well established rule of statutory construction, that Congress, in inserting the provision above quoted in Section 4 of the Renovated Butter Act of 1902, intended that a construction should be placed upon it similar to that given the identical provision in the Plumley case.

With this fact in mind, it is respectfully submitted that this Court can reach no other conclusion than that Congress intended to make it clear that the power of the States over the subject of the manufacture and sale of process and renovated butter within their respective limits was to be unrestricted, even though the effect of such regulation might be the imposition of an indirect burden upon interstate commerce.[11]

The incorporation into the Renovated Butter Act of Section 3243 of the Revised Statutes, Title Internal Revenue, is not the only specific indication of the Congressional intention not to restrict the

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[11] Austin vs. Tennessee, 179 U. S. 343, 363; Schollenberger vs. Pennsylvania, 171 U. S. 1, 28; Savage vs. Jones 225 U. S. 501.

State in the exercise of its lawful police power. A further indication of the will of Congress that interstate commerce might be subjected to restrictions on the part of the States, with respect to the regulation of process or renovated butter, is the provision contained in Section 1 of the Act:

> "That all articles known as oleomargarine, butterine, imitation, process, renovated, or adulterated butter, or imitation cheese, or any substance in the semblance of butter or cheese not the usual product of the dairy and not made exclusively of pure and unadulterated milk or cream, transported into any State or territory or the District of Columbia, and remaining therein for use, consumption, sale, or storage therein, shall, upon the arrival within the limits of such State or Territory or the District of Columbia, be subject to the operation and effect of the laws of such State or Territory or the District of Columbia, enacted in the exercise of its police power to the same extent and in the same manner as though such articles or substances had been produced in such State or Territory or the District of Columbia, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise." (32 Stat. 193)

Here again, we find Congress adapting to the Renovated Butter Act of 1902, the provisions of another statute which had been construed by this Court. The provisions of Section 1 of the Renovated Butter Act are identical in every respect (save the

changes made to conform the provisions to the nature of the subject dealt with) to the provisions of the Act of Congress of 1890, the so-called Wilson Act (26 Stat. 313) which provided:

> "That all fermented, distilled, or other intoxicating liquors or liquids transported into any State or Territory or remaining therein for use, consumption, sale or storage therein, shall upon arrival in such State or Territory be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise." (p. 205)

The obvious purpose of inserting Section 1 into the Renovated Butter Act of 1902 was to clearly assert the Congressional intention that the State might act to protect the health of its citizens with respect to unclean butter, even though such butter might still remain in the original packages in which it had been introduced into the State. As a practical matter, it may be observed that Section 1 was inserted to avoid the decision of this Court in *Schollenberger vs. Pennsylvania*, 171 U. S. 1, supra.[12]

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[12] Indicative of the Congressional thought concerning the addition of Section 1 to the Renovated Butter Act of 1902, are the statements of Sen. Spooner, an advocate of the bill. (Congressional Record, Senate Volume 35, Part 4, pp. 3604, 3605, Fifty-seventh Congress 1st Session). (See Appendix page 47).

In *In Re Rahrer* 140 U. S. 545, this Court, in considering the effect of the provision of the Wilson Act above quoted, after noting that the act provided that imported liquors should be subject to the operation and effect of the State laws to the same extent and in the same manner as though the liquors had been produced in the State, observed:

> "Petitioner was thereby prevented from claiming the right to proceed in defiance of the law of the State, upon the implication arising from the want of action on the part of Congress up to that time. The laws of the State had been passed in the exercise of its police powers, and applied to the sale of all intoxicating liquors whether imported or not, there being no exception as to those imported, and no inference arising, in view of the provisions of the state constitution and the terms of the law, (within whose mischief all intoxicating liquors came), that the State did not intend imported liquors to be included. We do not mean that the intention is to be imputed by violating any constitutional rule, but that the State law should not be regarded as less comprehensive than its language is, upon the ground that action under it might in particular instances be adjudged invalid from an external cause.
>
> "Congress did not use terms of permission to the State to act, but simply removed an impediment to the enforcement of the state laws in respect to imported packages in their original condition, created by the absence of a specific utterance on its part. It imparted no power to

the State not then possessed, but allowed imported property to fall at once upon arrival within the local jurisdiction." (140 U. S. 564)

A like conclusion is reached in *Clarke Distilling Company vs. Western Maryland Ry.* 242 U. S. 311, involving the so-called Webb-Kenyon Law.[13]

It must be remembered, too, that the Renovated Butter Act of 1902 is captioned,

> "An act to make oleomargarine, and other imitation dairy products, subject to the laws of any State or Territory or the District of Columbia into which they are imported."

It is earnestly submitted that each of the provisions of the statute and the title of the statute, to which reference has been hereinabove made, clearly indicate that Congress was not concerned with interfering, nor in attempting to interfere, with any of the States in the matter of regulating the purity of the kind of product here considered.

But, it is argued by petitioner, Congress did not, by the insertion of the foregoing provisions, make raw materials moving in interstate commerce, for manufacture into process butter, subject to state laws. The weakness of this contention is self-apparent. This Court, in *In Re Rahrer*, 140 U. S. 545, 557, recognized the right of a State, as an incident

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[13] 37 Stat. 699 (1913)

to its power to regulate, to "use means to ascertain the fact". Of consequence, it follows, as observed by the Circuit Court of Appeals of the Fifth Circuit, in its opinion in this cause, that it should not be implied from the statute that the Congress which had declared that the finished product, when introduced into a State, would be subject to the laws of that State, intended by that same act to exclude the State of manufacture from the regulation of ingredients used in the manufacture, with the result that persons might set up as manufacturers in particular states under the protection of Congress and then import into them and use, in the manufacture of food products therein, impure or unfit products, free from inspection by and regulations of, the State, designed to prevent such importation and use.

Or, in other words, stating the necessary result of the argument of counsel from a concrete consideration of the particular subject here involved, that though Congress, in enacting the Renovated Butter statute, had considered the nature and character of our dual system of government, State and Nation, and instead of absolutely prohibiting, had so conformed its regulation as to produce cooperation between the local and national forces of Government, to the end of preserving the rights of all, it had thereby removed from the States control over the packing stock butter which might or might not later be used in the manufacture of process or renovated butter shipped in interstate commerce. The abnormal result to which this argument leads is at once apparent. It was obvious to the Circuit Court of Ap-

peals, and it can be none the less obvious to this Court, that the argument of petitioner virtually comes to the assertion that in some undisclosed way, by the exertion of Congressional authority, seeking to convey additional powers to the States, or to remove restrictions on existing powers, power once possessed by the State of Alabama, has evaporated.[14]

It is, therefore, earnestly insisted that since Congress has clearly indicated its recognition of the right of the State of Alabama to regulate the manufacture and sale of renovated or process butter, the Court of Appeals was correct in declining to find in the statute radiations beyond the obvious meaning of the language therein used.[15]

3.

Assuming that the Renovated Butter Act is a "regulation of commerce" and that Congress has not specifically indicated its will to allow state restrictions, nevertheless the Act does not operate to render inoperative the States' right of action in cases of this kind.

Under Propositions 1 and 2, we have proceeded on the theory that the proper point of beginning in the consideration of the scope of any disputed

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[14] Cf. the logic employed by Chief Justice White in Clark Distilling Co. vs. Western Maryland Ry., 242 U. S. 311, 327-28.

[15] Federal Trade Commission v. Bunte Bros. Inc., No. 85, decided February 17, 1941.

statute is with the words of the statute itself. It is submitted that we have successfully shown that the words of the Renovated Butter Act of 1902 specifically indicate a Congressional intention to permit State action in matters of this kind. But counsel for petitioner is earnestly contending that the words themselves are not sufficiently definite to indicate an intention on the part of Congress to permit such regulations. In support of this argument, that the Renovated Butter Act excludes the inspection of packing stock butter in interstate commerce by state officers, counsel cite the following authority:

Napier v. Atl. Coast Line R.R. Co., 272 U. S. 606;
Northern Pacific R.R. v. Wash., 222 U. S. 370;
Southern R.R. v. Reid, 222 U. S. 424;
Missouri-Pacific R.R. v. Stroud, 267 U. S. 404;
L. & N. R.R. Co. v. State, 16 Alabama, App. 199;
C. R. I. & P. Co. v. Hardwick Co., 226 U. S. 426;
Adams Express Co. v. Croninger, 226 U. S. 491;
Erie R.R. v. New York, 233 U. S. 671;
New York Central R.R. v. Winfield, 244 U. S. 147;
Erie R.R. Co. v. Winfield, 244 U. S. 170;
Charleston & W. C. R.R. Co. v. Varnville Furniture Co., 237 U. S. 597;

Hereinafter called the "Railroad Cases".

Hines v. Davidowitz (MMS) 61 Sup. Ct. Rep. 399;
Oregon-Wash. R.R. Co. v. Wash., 270 U. S. 87;
Mo. Pac. Co. v. Porter, 273 U. S. 341.
(Petitioner's Brief, pp. 2 and 3.)

It will not be here denied that in each of the foregoing cases, this Court has held a Federal statute exclusive in its own field. It will not be denied that in each of the cases State action has been held to have been superseded by Federal legislation.

Let us, however, analyze the cases cited by counsel in the light of the statement of this Court in *Hines vs. Davidowitz*, No. 22, decided January 20, 1941, 85 L. ed. 366, 374, that,

> "The nature of the power exerted by Congress, the object sought to be obtained, and the character of the obligations imposed by the law, are all important in considering the question of whether Supreme Federal requirements preclude enforcement of State laws on the same subject".

Counsel is insisting that the Circuit Court of Appeals fell into error in applying to the facts in this case, as analogous, the cases of *Mintz vs. Baldwin*, 289 U. S. 346; *Pacific States Co. vs. White*, 296 U. S. 176; *Kelly vs. Wash.*, 302 U. S. 1; *S. C. Highway Department vs. Barnwell Bros.* 303 U. S. 177;

Townsend vs. Yeoman, 301 U. S. 441; and *Currin vs. Wallace*, 306 U. S. 1, rather than the cases upon which petitioner now relies.

But, is there not actually a vast disparity of both fact and logic in the two lines of cases?

Typical of the cases cited by petitioner, is the *Napier* case, 272 U. S, 606. Typical of the cases relied on by the Court of Appeals and by respondent, is *Mintz vs. Baldwin*, 289 U. S. 346. Let us examine these two cases and the rationale of each. Let us compare them in their essential facts.

The *Napier* case concerned itself with the construction of the Federal Locomotive Boiler Inspection Act. The question was whether that act had occupied the field of regulating locomotive equipment used on a highway of interstate commerce so far as to preclude State legislation.

The *Mintz* case considered the Cattle Contagious Diseases Acts. The question there was whether those acts precluded State legislation on like subjects.

In the *Napier* case, the State of Georgia had enacted statutes prescribing an automatic door to the fire box and a cab curtain for use on locomotives. In the *Mintz* case, the State of New York had enacted a statute requiring that cattle should not be imported for dairy or breeding purposes without a certificate certifying them to be free from disease.

In neither the *Napier* case nor the *Mintz* case had Congress, by specific language directed to that end, covered the particular action taken by the State.

But in the *Napier* case it was held that the Boiler Inspection Act "was intended to occupy the field", whereas in the *Mintz* case, the Court declined to find that the entire field had been occupied, and, instead, found a field of operation for the State statute.

Why this distinction?

In the *Mintz* case it is stated,

> "The purpose of Congress to supersede or exclude State action against the ravages of disease is not lightly to be inferred. The intention so to do must definitely and clearly appear".

It is to be seen, therefore, that the cases fall into several different categories.

In the first category, it seems, are those cases where the power of Congress is absolutely exclusive. These are the cases where the subjects are national in their character or admit only of one uniform system or plan of regulation. *Gilman vs. Philadelphia*, 3 Wall. 713; *Brown vs. Houston*, 114 U. S. 622; *Leisy vs. Hardin*, 135 U. S. 100; and *Robbins vs. Shelby County Taxing Dist.*, 120 U. S. 489 are a few of the many cases announcing this principle. The case with which we are now concerned obviously does not fall under this first category.

A second classification of cases includes those where matters of local concern are involved. These are the cases with which we now deal. In considering the opinions treating these cases, said to be of local concern, we see that this second classification has been further subdivided by this Court. In one series of cases, the Railroad cases, of which the *Napier* case is typical, the Court has found that Congress has preempted the field. In the other group of cases, of which *Mintz vs. Baldwin* is typical, a different view is obtained. One clue to this distinction has been quoted above from the Mintz case.

A further clue to the basis for the distinctions made is found in *C. R. I. Ry. Co. vs. Hardwick Elevator Co.*, 226 U. S. 426, 435, wherein it is stated that insofar as legislation relating to railroads is concerned, the State "had no inherent, but only permissive power". 226 U. S. 435. In *Adams Express Co. vs. Croninger*, 226 U. S. 491 at p. 506, the Court remarks with respect to the right of the State to regulate the liability of a carrier for a loss or damage to property carried,

> "Only the silence of Congress authorized the exercise of the police power of the State upon the subject of such contracts".

Again, in *Missouri Pacific vs. Porter*, 273 U. S. 341, we find it stated with respect to the power of Congress over railroads, that,

> "Its power to regulate such commerce and all instrumentalities is supreme". 273 U. S. 346.

It will be seen, therefore, that each of the Railroad Cases cited by counsel for petitioner, pivot on the proposition that the State *had no inherent right to regulate the subject*, and that once Congress had spoken, the State must remain inactive. This court has treated these cases as a group and as each new set of facts arises, has applied to it the rules formulated to govern the group.

The fundamental basis of the case of the *Oregon-Wash. R. R. Co. vs. Wash.* 270 U. S. 87, is that the State legislation there considered operated as an actual barrier and as a serious impediment to interstate commerce. Here again we are confronted with a situation involving interference with interstate commerce in a matter of national concern, the statute creating as it did, a substantial—indeed, a practically complete—barrier to the enforcement of such commerce.

The case of *Prigg vs. Pennsylvania*, 16 Peters 539, represents another category into which these cases may be placed. There, the State legislation considered operated in conflict with an implied prohibition in the Constitution. It was there held that a statute of Pennsylvania making it a felony to take and carry negroes for the purpose of returning them as slaves, interfered with the right of the owner to reclaim his slaves, which right was derived from the Constitution of the United States. The line of cases represented by the Prigg case, rest on the proposition that no State may trench on the province of Congress to determine whether the paramount interest of the nation demands nation-wide or local

action—for Congress is particularly charged by the Constitution with the responsibility for these functions of government.

The cases upon which the Circuit Court of Appeals lays its decision fall into an entirely different category. These cases, and others which might have been cited, rest on a construction of statutes involving action by States in matters in which they have an inherent right to act. Matters involving the health of their citizens.[16] Matters involving action by the State directed to the protection of its citizens from fraud and deceit.[17] State measures intended to mitigate the destruction of life, limb, or property and definitely to insure the safety of its citizens.[18]

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16 Plumley vs. Massachusetts, 155 U. S. 461 (oleomargarine colored to look like butter); Crossman vs. Lurman, 192 U. S. 189 (adulterated coffee; this case involves foreign commerce); Sligh vs. Kirkwood, 237 U. S. 52 (immature citrus fruits unfit for human consumption); Savage vs. Jones, 225 U. S. 501 (involving a statute requiring a statement of ingredients contained in butter products); Asbell vs. Kansas, 209 U. S. 251 (inspection of diseased cattle); Reid vs. Colorado, 187 U. S. 137 (penalizing the importation of cattle).

17 Corn Products Ref. Co., vs. Eddy, 249 U. S. 427 (label of syrup compounds); Hebe Co. vs. Shaw, 248 U. S. 297 (labeling of condensed milk); Merchants Exchange vs. Missouri, 248 U. S. 365 (weighing of grain); Townsend vs. Yeomans, 301 U. S. 441 (maximum charges for the services of warehousemen), Pacific States Co. vs. White, 296 U. S. 176 (regulating standards for the containers in which horticultural products are marketed); Powell vs. Pennsylvania, 127 U. S. 678 (prevention of deception in sales of butter and cheese).

18 Welch Co. vs. New Hampshire, 306 U. S. 72 (regulation of time of service of drivers of motor carriers); S. C. Highway Department vs. Barnwell Bros., 303 U. S. 177 (limitation of width and weight of vehicles used on highways); Maurer vs. Hamilton, 309 U. S. 598 (car over car method of transportation restricted); Kelly vs. Wash., 302 U. S. 1 (prevention of operation of unsafe or unseaworthy vessels); Missouri P. R. Co. vs. Norwood 283 U. S. 249, 257 (safety of train crews).

The right exercised by the State in these cases depended neither on the action, nor on the inaction of Congress. The subjects regulated in each of them were not essentially matters of national concern. The States did not act through the permission of Congress. This is equally true in the instant case. The State of Alabama, through its Department of Agriculture & Industries, is operating to protect the health of its citizens and those of other States[19] from possible injury resulting from the production within the borders of the State of Alabama of impure foods unfit for use. Congress has indicated no intention to regulate the packing stock butter, as such. No authority is granted to the agents of the Federal Government to seize this packing stock butter if it is found to contain matters which might spread disease and pestilence. But, counsel for petitioner argue, Congress has given the right to its agents to seize the finished product and the real danger to the public is in the finished product. That is counsel's conclusion. Such a line of argument, we submit, raises a question of fact which must be resolved in favor of the State. It must be presumed that the Legislature of Alabama, after investigation, determined that its citizens, and those of other States, could best be protected by the seizure of the packing stock butter; that though the impurities in the raw material might not be visible in the finished product, and, therefore, might not subject it to seizure under

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[19] Cf. Sligh vs. Kirkwood, 237 U. S. 52, 59.

Federal authority, such impurities, nevertheless, might still exist in fact, though not visible.[20]

Moreover, this Court has very aptly stated that,

> "The fact that a food or drug might be condemned by Congress if it passed from State to State, does not carry an immunity of foods or drugs, making the same passage, that it does not condemn".[21]

In considering cases of this type, involving, as they do, an exercise of the police power of the State for the protection of the health of its citizens, this Court has unanimously declared that it must be clear beyond all reasonable doubt that Congress intended to exclude all State action by the enactment of a statute affecting the field.

The test described by able counsel for petitioner as the "Compliance-Defiance" test, far from having been repudiated or rejected in cases involving State action under its police power to protect the health and safety of its citizens under circumstances involving local control, has, on the contrary, been repeatedly reaffirmed. We do not deny that the "Compliance-Defiance" test has not been applied in the Railroad Cases upon which the petitioner relies,[22] or in the case of *Oregon-Wash. R. R. Co., vs. Wash.*,

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[20] Cf. Pacific States Co. vs. White, 296 U. S. 176 at p. 186; Black, J., Dissenting Opinion in Polk Co. vs. Glover, 305 U. S. 5, 15 et seq.

[21] Weigle vs. Curtice Bros. Co., 248 U. S. 285 at p. 288.

[22] But compare Missouri P. R. Co. v. Norwood, 283 U. S. 249, at p. 257.

270 U. S. 87, involving an absolute restriction on interstate commerce where the Federal Statute was regulatory and obviously covered the entire field. We think, however, that we have successfully shown the factual and legal distinction between these cases and those upon which we rely.

We might also here paraphrase Mr. Justice Douglas' comments in *Nelson vs. Sears Roebuck & Co.*, No. 255, decided February 15, 1941:

> "Particular facts of specific cases determine whether a given statute preempts State regulation indirectly affecting interstate commerce. Hence a review of prior adjudications based on widely disparate facts, howsoever embedded in general propositions, does not facilitate an answer to the present problem."

It is, therefore, earnestly insisted that the State's action, being bottomed on the broad base of the protection of public health, does not stand as an obstacle to the accomplishment of the full execution of the purposes and objectives of the Act of Congress, known as the Renovated Butter Act of 1902, and consequently its exercise should not be restricted by this Court.[23]

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[23] Cf. Hines vs. Davidowitz No. 22, decided January 20, 1941, 85 L. ed. 366, 372.

II

THE CIRCUIT COURT OF APPEALS DID NOT ERRONEOUSLY FAIL TO FOLLOW THE CONSTRUCTION PLACED ON THE AGRICULTURAL CODE BY THE SUPREME COURT OF ALABAMA IN STATE VS. CECIL, 216 ALA. 391.

Petitioner's insistence that the Supreme Court of Alabama in *State vs. Cecil*, 216 Alabama 391, has held that the enactment of the Agricultural Code was within the exercise of the police power of the State, but that the operation of the Code was confined to intrastate commerce, reveals that petitioner has apparently overlooked two facts.

The first fact is that the Supreme Court of Alabama in the Cecil case did not consider the *entire* Agricultural Code, but limited its considerations to Article 23 of the 1923 Act (Act No. 376, H. 570, approved September 27, 1927, General Acts of 1923, p. 463), which act the Court refers to as the "Agricultural Code of 1923".[24] It is obvious that the Agricultural Code of 1927, which became effective on October 1, 1927, could not have been the subject of discussion in a decision rendered on April 7, 1927, as was the decision in the Cecil case. It is clear too, from an examination of the Agricultral Code of

[24] Copies of both the Agricultural Code of 1923 and the Agricultural Code of 1927 have been filed in the office of the Clerk of this Court for convenient reference by the Court.

1927, that Article 23 of the Agricultural Code of 1923 appears in the Agricultural Code of 1927 as "Article 25", rather than as "Article 23."[25]

It is apparent, therefore, that the Supreme Court in the Cecil case, considered only the provisions of the Agricultural Code of 1923 relating to the sale of farm products on commission,[26] and nothing therein can be deemed to indicate an intention to construe Article 23 of the Agricultural Code of 1927, (relating to suspension from sale of articles seized) or Article 7 of the Agricultural Code of 1927 (relating to the misbranding or adulteration of foods and drugs).

The second fact to which we have alluded above is equally as obvious. Assuming for the sake of argument that the Supreme Court of Alabama, had it been called upon to consider Articles 7 and 23 of the Agricultural Code of 1927, would have given voice to the same views expressed in dealing with Article 23 of the Agricultural Code of 1923 (now Article 25 of the Agricultural Code of 1927), we are unable to perceive that it has limited State action upon matters of this kind. At most, it can be contended only that the Supreme Court of Alabama has held that the State act is not aimed directly at interstate commerce. This we do not deny. In fact, the entire burden of this brief is directed to a similar argument. The act is not intended to regulate interstate

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[25] See Agricultural Code of Alabama, 1927, pp. 278-288.

[26] Article 25 of the 1927 Agricultural Code.

commerce. If it affects it at all, it does so only incidentally and within a permitted field. This Court has many times determined that while a statute may not, considered in its own nature, operate as a regulation of interstate commerce, the same act may none the less affect commerce incidentally.[27]

The cases of *Stafford vs. Wallace* 258 U. S. 495; *Dahnke-Wallace Milling Co. vs. Bondurant*, 257 U. S. 282; and *Chicago Board of Trade vs. Olsen*, 262 U. S. 1 cited by counsel for petitioner in support of the argument that packing stock butter stored in petitioner's plant and mixed with other butter acquired in Alabama for manufacture into the finished product for sale and shipment, remains in interstate commerce, furnish no support for such a contention. In each of these cases the subjects dealt with were "in the middle of the current of commerce". The stopping point in the states was considered to be merely a "throat through which the current flows". Such is obviously not the case here. Here the journey has ended for the packing stock butter. To paraphrase this Court's statement in *Bacon vs. Illinois*, 227 U. S. 504, at p. 516, "the property (the butter) was held by the petitioner for his own purposes and with full power of disposition".

It is, therefore, earnestly but respectfully submitted that the dissent of Judge Foster and the

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[27] Cf. Smith vs. Ala., 124 U. S. 465, 482; Minn. Rate Cases 230 U. S. 352; S. C. Highway Dept. vs. Barnwell Bros., 303 U. S. 177.

argument of counsel upon the proposition that the Court of Appeals erroneously failed to follow the Supreme Court of Alabama, fall of their own weight.

CONCLUSION.

In conclusion, therefore, it is submitted: First, that the statute of Alabama, the operation of which is attacked, is not, considered in its own nature, a regulation of interstate commerce even when applied as in the case under consideration; Secondly, that both the act and the administrative procedure thereunder are properly within the scope of the admitted power reserved to the State of Alabama, and inherent in this state, to protect the health and welfare of its citizens and those of other States who might suffer because of the actions of its citizens; Thirdly, that so far as the statute, and the administrative procedure following it, affect transactions of commerce among the States, they do so only indirectly, incidentally, and remotely, and not so as to burden or impede them; and Finally, in the particulars in which such statute and such procedures under it touch those transactions at all, neither the statute nor the procedure is in conflict with any express enactment of Congress on the subject, nor contrary to any intention of Congress to be presumed from its silence.

Upon these reasons we base our contention that the petition for Writ of Certiorari should be denied, or, in the alternative, we respectfully suggest that

guard the health of the inhabitants of the State, and to protect those inhabitants from fraud and imposition, are valid when reasonable in their requirements and not in conflict with Federal laws, although they may affect interstate commerce in their relation to articles prepared for export or by including, incidentally, those brought into the State. In *Eichholz v. Public Service Commission of Missouri*, 306 U. S. 268 at page 274, Mr. Chief Justice Hughes observes:

> "But in the absence of the exercise of federal authority, and in the light of local exigencies, the State is free to act in order to protect its legitimate interests *even though interstate commerce is directly affected.*" (Emphasis supplied).

It will not be disputed, we think, that it is within the power of the State to make regulations in the exercise of the police power prohibiting within its borders the manufacture and sale of adulterated food, and that such action does not violate the commerce clause of the Federal Constitution even though its effect is to impose a burden on interstate commerce.[2]

The pertinent provisions of the Agricultural Code of Alabama of 1927 are obviously directed to

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[2] Clason v. Indiana, 306 U. S. 439; Corn Products Ref. Co. vs. Eddy, 249 U. S. 47; Weigle v. Curtice Bros. Co., 248 U. S. 285; Sligh vs. Kirkwood, 237 U. S. 52; Savage vs. Jones, 225 U. S. 501; Crossman vs. Lurman, 192 U. S. 189; Plumley vs. Massachusetts, 155 U. S. 461; Powell vs. Pennsylvania, 127 U. S. 678.

the end of protecting the health of the inhabitants of the State of Alabama, and apparently the provisions seek to safeguard against the consequence of ignorance and incapacity, as well as fraud.[3] The pertinent sections of the Agricultural Code of Alabama, 1927, are set out in the Appendix at pp. 42-47.

Reference to Section 36 of Article 7 reveals that the purpose of the article is,

> "to prevent the manufacture, possession, sale or delivery of adulterated or misbranded food and drugs, and for other purposes".

In line with this purpose, it is provided by Section 218 that,

> "* * * any article of food or drug which is adulterated * * * and which is * * * delivered within this state * * * shall be liable to be proceeded against in the Circuit Court of the County where the same is found and seized for confiscation by writ of attachment for condemnation".

The term "food" is defined by Section 38 as including

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[3] Cf. Plumley vs. Massachusetts, supra p. 472, citing Dent vs. West Virginia, 129 U. S. 114, 122.

the judgment of the Circuit Court of Appeals for the Fifth Circuit be affirmed.

Respectfully submitted,

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APPENDIX

AGRICULTURAL CODE OF ALABAMA OF 1927

Section 36. **Misbranding and Adulteration of Foods and Drugs.**—The purposes of this Article are to prevent the manufacture, possession, sale or delivery of adulterated or misbranded food and drugs, and for other purposes. The State Board of Agriculture shall have the power and authority, and it shall be its duty: (a) To promulgate all rules and regulations necessary to the accomplishment of the purposes of this Article and make effective its provisions; (b) To fix the standards of purity for all food and drug products which shall be, so far as practical, in accordance with the standards promulgated by the Federal Government through its duty authorized agents.

Section 37. **Possession; Sale and Delivery of Prohibited Articles.**—No person within this State shall manufacture for sale therein, have in possession with intent to sell, offer or expose for sale, sell, or deliver any article of food or drugs which is adulterated or misbranded within the meaning of this Article.

Section 38. **Definition of Words and Terms.**—The word "article" when referring to food or drugs, is used in the broad and comprehensive sense and has reference to the food product or the drug product in question. The term "food" as used herein shall include all articles of food, drink, confectionery, or condiment, whether simple, mixed or compound, used or intended for use by man or domestic animals. The term "drug" as used herein shall include all medicines and preparations recognized in the U. S. Pharmacopoeia or National Formulary for internal or external use and any substance or mixture of substances to be used for the cure, mitigation or preventation of disease in man or domestic animals. The words

"standard of purity or quality" herein used shall refer to and include the standards of purity for food products promulgated by the State Board of Agriculture and statutes of this State.

Section 39. **Adulteration of Food.**—An article shall be deemed adulterated in the case of food. First. If any substance has been mixed and packed with it so as to reduce or lower or injuriously affect its quality or strength. Second. If any substance has been substituted wholly or in part for the article. Third. If any valuable constituent of the article has been wholly or in part abstracted. Fourth. If it be mixed, colored, powdered, coated, stained, or otherwise treated in a manner whereby damage or inferiority is concealed, or in a manner whereby the appearance of said Article is improved; provided this shall not apply to the precoloring or processing of fruits where such precoloring or processing does not conceal damage or inferiority. Fifth. If it contains any poisonous or deleterious ingredient which may render such article injurious to health; Provided, that when in the preparation of food products for shipment they are preserved by an external application applied in such a manner that the preservative is necessarily removed mechanically, or by maceration in water, or otherwise, and directions for the removal of said preservative shall be printed on the covering of the package, the provisions of this Article shall be construed as applying only when said products are ready for consumption. Sixth. If it consist in whole or in part of a filthy, decomposed, or putrid animal or vegetable substance, or any portion of an animal unfit for food, whether manufactured or not, or if it is the product of a diseased animal, or one that has died otherwise than by slaughter. Seventh. If in the course of its preparation of manufacture an ingredient of inferior food value has been substituted in whole or in part for an ingredient of greater food value. Eighth. If it does not conform to the standard of purity or quality established for the article.

Section 217. As Amended by General Acts 1935 pp. 1102, 1103. **Section 217. Suspension of Sale of Article.**—If at any time the Commissioner or his duly authorized agent, shall have reason to believe that any product or products or article mentioned in the succeeding sections of this Article, which are held in possession, delivered, kept, offered or exposed for sale in this State, do not comply with the requirements of this Article or other Article of this Code as to ingredients, substance, analysis, marking or labelling, weight or measure of the same, it shall be his duty by written order to suspend the sale of the same until he shall have satisfied himself, or shall be satisfied by an analysis, or otherwise, that such product or article is made up, compounded or marked as required by law and rules and regulations under authority of law. If he shall find that the same does not comply with such laws and rules and regulations, either before or after the making of such suspension order, then he is authorized to proceed with regard to the same as provided in the succeeding Sections of this Article, or he may order in writing the same to be held at his disposition pending the placing of such product or article in such condition as will meet the requirements of such laws, rules and regulation, under the supervision and direction of the Commissioner or his duly authorized agent, or at the discretion of the Commissioner proceeding with regards to the same as provided in the suceeding Sections of this Article. Provided in case the owner of such product or article denies by written notice to the Commissioner or his agent that the same is not in compliance with the laws, rules or regulations and requests a hearing thereon, the Commissioner or his agent shall as soon as practicable thereafter proceed as provided in the succeeding Sections of this Article, in order that the Court may hear and decide said issue and proceed as provided for in the succeeding Sections of this Article. Any person who moves, transports,

sells or in any other manner disposes of any product or article after such product has been ordered suspended or held as hereinbefore provided shall be guilty of a misdemeanor and upon conviction thereof fined not more than Five Hundred ($500.00) Dollars or imprisoned for not more than six months or both, provided that such product or article may be moved, transported or otherwise disposed of by and in compliance with written order by the Commissioner.

Section 218. **Proceeding to Condemn Seized Article.** —Any fertilizer, fertilizer material, ground limestone, paint, white lead; linseed oil, turpentine, kerosene or other illuminating oils, gasoline, benzine or other liquid motor fuels, insecticides and fungicides, commercail feeds, agricultural seeds, eggs, vinegar, sausage, milk, cream, ice cream or other dairy products, imitation butter and cheese, or any article of food or drug which is adulterated misbranded or under standard, grade, weight or measure claimed within the meaning of any provision of this Code, and which is manufactured for sale, held in possession with intent to sell, offered or exposed for sale, or sold or delivered within this State, shall be liable to be proceeded against in the Circuit Court of the County whree the same is found and seized for confiscation by writ of attachment for condemnation. Such writ shall issue upon the swron complaint of the Commissioner or his duly authorized agent, taken by an officer authorized to administer an oath to the effect that such articles or product is adulterated or misbranded or is under standard, grade, weight or measure claimed, as the case may be within the meaning of this Article. The said sworn complaint by said Commissioner or his duly authorized agent, may be amended at any stage of the proceedings. Said writ shall be returnable in five days to the Court issuing the writ; such Court shall hear and decide whether the allegations of the complaint are true and whether said article or product shall be condemned and confiscated. Such

hearing shall not be had until five days' notice of the date therefor shall have been served on the owner, his agent, or any other party having an interest in the same, except in case defined in subhead (a). Service of a copy of the writ of attachment showing the returns of the attaching officer shall be sufficient notice for the purposes of this Section. Such writ may be executed by the Commissioner, his duly authorized agent, or by any sheriff or constable in the State. Upon the seizure of the article or product described in the affidavit, it shall be the duty of the officer or person executing the writ to return same to the Circuit Court, with his return thereon, and within five days after its return, the Court shall make up an issue between the State as Plaintiff and the property seized as defendant. (a) In the event that the owner or his agent cannot be found in this State, then said service may be perfected by posting a copy of the writ in a conspicuous place upon the premises where the goods were found and seized, and by mailing a copy thereof by registered mail to the owner, or his agent, to his last known address, and this shall be deemed to be sufficient service of the notice required by this Section. If upon the return day of such writ of attachment, the owner of the article or product, his agent or other party having an interest in same thus notified fails to appear and show cause why said goods should not be condemned, judgment of condemnation and confiscation shall, upon such default, be rendreed by the Court on the basis of said complaint. If such owner or agent or other party having an interest in such article or product shall on or before the return day of the writ of attachment, or upon such other day as the Court upon application of such party may determine, shall file an answer upon oath denying the allegations of adulteration, misbranding, or under standard, grade, weight or measure, as the case may be, in said complaint, the issue thus raised may be determined by the Court after hearing all the evidence offered by or in behalf of all the parties to the proceedings. Any such party may

demand a jury trial of any issue of fact to be determined in the proceedings instituted hereunder, and in case a jury trial is demanded, the judgment rendered by the Court shall be in accordance with the facts as found by such jury; provided, however, that the verdict of the jury may be set aside by the Court where manifestly contrary to the evidence of law. If a judgment of condemnation and confiscation is rendered against such article or product as being adulterated, misbranded, or under standard, grade, weight or measure, within the meaning of this Article, the same shall be disposed of by destruction or sale, as the Court may direct, and the proceeds thereof, if sold, less the legal costs and charges, shall be paid into the Agricultural Fund, but such goods shall not be sold contrary to the provisions of this Article; provided, however, that upon the payment of the costs of such attachment proceedings and the execution and delivery of a good and sufficient bond to the effect that such article shall not be sold or otherwise disposed of contrary to the provisions of this article, the Court may be ordered direct that such article or product shall be delivered to the owner thereof.

REMARKS OF SENATOR SPOONER—APRIL 3, 1902—CONGRESSIONAL RECORD, FIFTY-SEVENTH CONGRESS—VOLUME 35, PART 4, PAGE 3604

"In the Plumley case the statute of Massachusetts prohibited the sale, not of oleomargarine which disclosed its own nature, not of oleomargarine which could be identified as such—that was excepted—but of oleomargarine, or the custody of it for sale, wherever it came from, if manufactured in imitation of yellow butter produced from pure unadulterated milk or cream. The court held that the act of Massachusetts was a valid act. Later the Pennsylvania statute, which prohibited the possession for sale of oleomargarine, colored or uncolored, came before the Supreme Court of the United States. The oleomargarine

had been brought in, I think, from the State of Rhode Island. What did the court hold about it? The court held that a statute which attempted to prevent the transportation of oleomargarine from State to State in any form was beyond the power of the State. Why? Because they took judicial notice of the fact that oleomargarine was a healthful product, and they stid no State can be permitted, in the exercise of its police power, to say that a healthful product shall not enter into commerce between the States.

That was a necessary decision; nobody could question it, because, as I said the other day, if the States were permitted to say what should or should not be transported from State to State the regulatory power of Congress over interstate commerce would be gone. Did that decision conflict in any way with the decision in the Plumley case? Not at all. The court held that while a State could not prevent, in the exercise of its police power, the transportation from another state into its boundaries of oleomargarine in its natural color so that it could be identified for what it was, where it was colored in the similitude of butter a State had the power, as protecting the consumers from fraud, to prevent its sale within that State, even though it came from another State. So that in this very case, as to this very product, the Supreme Court of the United States, by these two decisions—and in the Schollenberger case, in order to emphasize the distinction, they italicize the words "manufactured in imitation of yellow butter"; etc.—decided that one, the article sold for what it is, is a legitimate article of commerce; that no State can prevent its transportation from another State into its boundaries, or is sale after transportation, because the police power of the State cannot be used in order to destroy interstate commerce in a healthful article.

On the other hand, they held that where the same article is colored to cheat the eye as well as the sense

of smell and taste, to be an easy imposition upon those who want butter, it is in the power—it not being a legitimate article of interstate commerce—of the State, exercising its police jurisdiction, to arrest it and absolutely prohibit it. And so upon that alternative basis, dealing first with the product that is a genuine product, and alternatively with it as a fraud, Mr. President, as Mr. Justice Harlan says it is; and he says it is colored to be a fraud, and I believe it to be—dealing with it in the alternative way, this bill says, substantially, "If you manufacture it so that those who buy it will know what they are buying, a tax of one-quarter of one cent a pound is put upon it. If you choose to attempt to evade this tax by making a counterfeit of it, so that it resembles an article which is not taxed by law, and therefore may be sold simply because of its color, without paying the one-fourth of one cent a pound, or if you color it—for it comes to that also—so as to be able to perpetrate a fraud upon the consumers, you shall pay ten cents a pound upon it."

If there is anything unconstitutional about that, Mr. President, I do not see it. I repeat today what I said the other day, that a business which comes before Congress with the statement that its life depends upon being permitted to violate the laws of 32 States with comparative imunity, and to unrestrainedly put upon the market an article which looks and tastes and smells like something which it is not, is not much entitled to consideration.

Does the bill interfere or invade in any way the rights of the States????? Of course, a State must not be permitted to say what article subject to Federal taxation can be taxed in a State. Does this invade in any way the sovereignty of a State? Does it do so any more than in the case of the Federal liquor tax? The Congress taxes liquor made in Wisconsin. The State of Wisconsin has the power, the Supreme Court say, to prohibit its manufacture within its boundaries. Of course, in that event

there would be no tax to be collected from it. So as to oleomargarine. The States, under this law, may prohibit its manufacture colored in the similitude of butter; but if they permit its manufacture colored in the similitude of butter they cannot exempt it from the tax imposed by Congress.

The provision in the House bill which the committee have struck out, was intended—I will not say by the man who introduced it, for I do not know who introduced it—to interject into this bill, if it should become a law, a constitutional question upon the basis that it left the States free to authorize or permit its manufacture and sale without tax when colored in the similitude of butter. Of course, if that were its object—and I have some very strong evidence that it was so regarded by those who are fighting this bill—the whole tax here would become invalid the moment a State exercised that power and permitted oleomargarine to be manufactured exempt from the tax imposed by Congress, for the rule of uniformity would thereby be broken; and evidently Congress cannot levy a tax and permit any State to make that State an exception to its operation.

I want further to say, Mr. President, that **this bill does not in any way shackle a State. It is a concession to the States, as has been generally understood, because up to this time, I believe, it has been generally regarded, that the original package doctrine has been held to be applicable to this product when it is imported into the States, and that the States have no power, therefore, to regulate it or to interfere with it until the original package is broken. I am not at all certain that that is good law, but it has been so regarded. But under the provisions of this bill that cannot be again contended, because, whether necessarily or unnecessarily, this bill applies to oleomargarine the provisions similar to the Wilson law.**

I do not know how Senators propose to get away from these two decisions of the Supreme Court of the United States, differentiating from the standpoint of legitimacy and fraud the uncolored oleomargarine and the butter-colored oleomargarine, holding that one, the genuine article, no State can exclude; holding that the other, the illegitimate article, because easily put upon the market for butter, a State has the power to exclude altogether as a fraud."

FORM USED IN SEIZURE IN THIS CASE

AFFIDAVIT FOR WRIT OF ATTACHMENT FOR CONDEMNATION:

(as provided in Section 218, of the Agricultural Code of Alabama of 1927)

STATE OF ALABAMA

COUNTY OF JEFFERSON

Before me Richard V. Evans, (CIRCUIT JUDGE) of the county of Jefferson, in Alabama, personally appeared E. F. Cottier, who being duly sworn, deposes and says, (1) that he is a duly authorized agent of the Commissioner of Agriculture and Industries of this State, (2) that there is located on the premises of Birmingham Ice and Cold Storage Co., Birmingham, Ala., certain packing stock butter described as follows, to wit:

10-55 gallon steel drums containing 3,991 pounds of packing stock butter represented by sample Nos. 61 C-K thru 70 C-K incl.

(To credit of Cloverleaf Butter Co., Birmingham, Ala.)

which, affiant, E. F. Cottier has probable cause to believe, and does believe, is manufactured for sale, or held

in possession with intent to sell, or offered, or exposed for sale, or sold, or delivered within this State, and on the 21 day of June, 1939 was held in possession by a person within the State of Alabama who manufactures, sells, keeps for sale, offers or exposes for sale, serves, distributes or delivers the same; and which, affiant, E. F. Cottier, has probable cause to believe, and does believe, is adulterated within the meaning of the provisions of the Agricultural Code of 1927, and amendments thereto, in the following particular to wit:

> said butter is adulterated in that it consists in whole or in part of a filthy animal substance, namely, butter which contains maggots, flies, fly fragments, rodent hairs and other extraneous matter

contrary to law and against the peace and dignity of the State of Alabama; and (3) that such butter should be seized and forfeited to the State.

E. F. Cottier

Name of Party making Affidavit

Sworn to and subscribed before me this the 21 day of August 1940

Richard V. Evans, Circuit Judge

Name and Style of Officer taking Addidavit